Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1651

In the Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LAURENCE S. FORDHAM, P.C.*
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

* Attorney of Record

Blanchard Press, Inc., Boston, Mass.—Law Printers [617] 426-6690

TABLE OF CONTENTS

	Page
Table of Authorities	I
Statement of the Case	1
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

Cases

AT&T Technologies, Inc. v. *Communications Workers of America*, No. 84-1913, 54 U.S.L.W. 4339 (April 8, 1986) ..... *passim*

Fusari v. *Steinberg*, 419 U.S. 379 (1974) 2

John Wiley & Sons v. *Livingstone*, 376 U.S. 543 (1964) .. 3

Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 v. *Royal Center, Inc.*, 754 F.2d 835 (9th Cir. 1985) 2

Nolde Bros. Inc. v. *Local No. 385, Bakery & Confectionery Worker's Union*, 430 U.S. 243 (1977) 3, 4

Royal Center, Inc. v. *Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226*, No. 85-299, 54 U.S.L.W. 3696 (April 22, 1986) ..... *passim*

United Steelworkers of America v. *American Manufacturing Co.*, 363 U.S. 564 (1960) 2, 4

In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1651

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

On April 24, 1986, the petitioner, WNEV-TV, New England Television Corp. ("WNEV-TV") filed its Supplemental Brief to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit. Its Petition was filed on April 7, 1986. WNEV-TV submitted the supplement, pursuant to Fed. R. App. P. 22.6, to address the relationship between this Court's recent decision in *AT&T Technologies, Inc.* v. *Communications Workers of America*, No. 84-1913, reported at 54 U.S.L.W. 4339 (April 8, 1986) (hereinafter referred to as "*AT&T*")[1] and the Petition of WNEV-TV.

---

[1] The Court's decision in *AT&T* is reprinted in the Supplemental Brief Appendix, p. A-3.

The necessity for this second supplement arose because on April 22, 1986, in another related matter, *Royal Center, Inc.* v. *Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226*, No. 85-299 (hereinafter referred to as "*Royal*"), this Court granted the petition for a writ of certiorari, vacated judgment and remanded for further consideration. Petitioner submits this second supplement in satisfaction of its duty to this Court, pursuant to Fed. R. App. P. 22.6, to call attention to its decision in *Royal* and to address the relationship between the action taken by this Court in *Royal* and the Petition of WNEV-TV. *See Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1974) (Burger, C.J., concurring).

WNEV-TV respectfully suggests that this case presents the Court with the opportunity to advance the law of arbitrability and to reduce confusion and uncertainty confronting the courts in their attempts to apply the principles of the Steelworkers Trilogy, recently reaffirmed in *AT&T*. WNEV-TV respectfully urges this Court to accept its case for full review.

Argument

In *Royal*, this Court again considered a petition for writ of certiorari in a matter concerning the broad issue of arbitrability. This Court granted certiorari. It vacated the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the matter for further consideration in light of its decision in *AT&T*. *See* 54 U.S.L.W. 3696 (April 22, 1986).

In the ruling below, the Ninth Circuit, based on precedent of this Court, had decided after rehearing that the survivability of an arbitration agreement and the scope of an arbitration clause are questions to be determined by it, and not the arbitrator. *See Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 754 F.2d 835, 837-838 (9th Cir. 1985). Based generally upon its application of *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), and, more particu-

larly, *Nolde Bros. Inc.* v. *Local No. 385, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) and *John Wiley & Sons* v. *Livingstone*, 376 U.S. 543 (1964), the Ninth Circuit had held that the arbitration agreement survived termination and that the two grievances of the union,[2] including the "alter ego" claim, were within the scope of the arbitration clause. *Id.* at 840. Royal Center, Inc. sought review by this Court.

Since the Ninth Circuit had determined arbitrability as it was required to do, this Court's remand was, of necessity, for reconsideration of the scope of arbitrability in an area relatively well developed by the prior decisions of this Court in *Nolde, supra*, and *Wiley, supra*. Nonetheless, the Court determined that reconsideration was appropriate apparently to review and reconsider the balance that was struck by the Ninth Circuit between the presumption of arbitrability, on the one hand, and the contract as the exclusive source of rights, on the other hand.

Here, the questions presented are much more focused. They are in areas which are both unsettled and not previously illuminated by decisions of this Court.

One question—which has not been considered ever by this Court—involves a failure to follow contract process under a contract which contains a specific provision barring arbitration where such a failure occurs. There is also a question as to the scope of the arbitration agreement, as there was in *Royal*. But, here, the question of scope—whether a non-contractual past practice claim may be arbitrated as of right under a contract-based arbitration clause—is one never previously considered by this Court, in contrast with *Royal* which follows in the trail of *Nolde, supra*, and *Wiley, supra*. A related ques-

---

[2] One grievance involved an alleged contract violation which occurred after the termination of the collective bargaining agreement. The second grievance involved the union's contention that the collective bargaining agreement was binding on a second company because it was the "alter ego" of the bargaining company.

tion also is presented where contract sections belatedly cited to support the non-contractual past practice claim do not on their face even remotely support the claim. Such question raises doubts both under *American Manufacturing*, *supra* at 568, and under *Wiley*, *supra* at 555, as to whether an arbitral award can find support in the contract and receive judicial sanction.

In contrast to *Royal*, there is also presented here a question as to who decides arbitrability. The First Circuit declined to do so in this case, as the Fifth Circuit declined to do in *AT&T*, but, in comparison, the Ninth Circuit did so in *Royal*.

The Court's action in *Royal*, a case generally informed by the Steelworkers Trilogy and specifically informed by *Nolde*, *supra*, and *Wiley*, *supra*, when compared to this case, a case involving focused questions which are not specifically informed by any decision of this court, reinforces the appropriateness of granting the Petition here and accepting the case for full review in the interest of advancing the law of arbitrability, and clarifying longstanding areas of uncertainty.

Alternatively, *a fortiori*, this is a case for the Court to take the same action it took in *Royal*. At the very least, the Court should grant certiorari, vacate the decision below and remand this case to the First Circuit for further consideration in light of *AT&T*. As pointed out above, this case involves referring a question of arbitrability to the arbitrator and deciding questions of the scope of the Agreement and its arbitration clause in areas not previously illuminated by decisions of this Court. In these respects, it is beyond *Royal* and presents a far easier case for summary disposition, if the court is not persuaded that full review is warranted.

Conclusion

For the reasons stated in the Petition, the supplement and this second supplement, this Court should grant the Petition herein and review fully the First Circuit's decision. Alternatively, it should proceed by summary disposition, as it did in *Royal*, and vacate and remand for "further consideration in light of *AT&T*."

Respectfully submitted,

LAURENCE S. FORDHAM, P.C.
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner